

2003642 (Migration) [2023] AATA 1922 (6 April 2023)

1.

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Ms Karyn Anderson (MARN: 9685590)
CASE NUMBER:	2003642
HOME AFFAIRS REFERENCE(S):	BCC2018/2846993
MEMBER:	Stephen Conwell
DATE:	6 April 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa: • Public Interest Criterion 4020 for the purposes of cl. 309.225 of Schedule 2 to the Regulations

Statement made on 06 April 2023 at 11:35am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – bogus document provided with application – birth certificate for child naming applicant as father – parties in different countries around time of child’s conception – concession that sponsor’s ex-husband is father of child – one encounter with ex-husband after marriage to applicant – genuine relationship and applicant’s parental role – no requirement to provide biological father’s name when applying for certificate – decision made without hearing necessary – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 65, 360

Migration Regulations 1994 (Cth), Schedule 2, cl 309.225; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP (2014) 220 FCR 169

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 10 January 2020 to refuse to grant the applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The visa applicant (the applicant) applied for the visa on 30 July 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 309.225 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the applicant did not satisfy PIC 4020 due to his submitting of a bogus document.
4. The applicant was represented in relation to the review by his registered migration agent (representative).
5. The applicant provided the Tribunal with a copy of the delegate's decision record.
6. The Tribunal has considered the information provided to the Department, and the matters in the Department decision record dated 10 January 2020, and the information and submissions provided to the Tribunal. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the applicant on the basis of the material before it, pursuant to s.360(2) of the Act.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. At the time of visa application, a copy of a birth certificate (registered in Victoria on 6 August 2019, recording the birth of [a child] on [Date]) was provided to the Department. The document recorded the review applicant (the sponsor) as the mother and the applicant as the father of the child.
14. Departmental investigation established that at the approximate time of the child's conception the parties were not in the same country. On 20 November 2019, the Department wrote to the parties inviting them to comment on the possibility that they had provided a bogus document as part of the visa application, specifically relating to the birth certificate recording the applicant as the father of the child when it was likely that he wasn't the biological father.
15. In her written response of 11 December 2019, the sponsor stated that her ex-husband was the biological father of the child, as, in a 'lapse of judgement' the sponsor had slept with her ex-husband on one occasion in late 2018. Upon learning of her pregnancy the sponsor disclosed this to the applicant since she had already married the applicant some months prior, in May 2018.
16. The delegate found that since both parties knew the applicant to not be the biological father of [the child], recording as such on the birth certificate rendered it to be a bogus document as defined by s.5(1) of the Act. Consequently the delegate found the birth certificate to be a bogus document and therefore PIC 4020(1) was not met.
17. The delegate decided there were no compelling circumstances that affected the interests of Australia or any compassionate or compelling circumstances that affected the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that would justify the grant of this visa.
18. The definition of '*bogus document*' is found in s.5(1)(c) of the Act;
 19. "*bogus document*", in relation to a person, means a document that the Minister reasonably suspects is a document that:
 - (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly."

20. The representative's written submission of 5 January 2023 summarises the events leading to the child's conception and the parties' mutual decision regarding the birth certificate:
21. In September 2018, [the sponsor] and some friends gathered at her house for a party on a Saturday night, as they often did on Saturday nights. Her ex-husband came by to the house to repay some money to her and joined in on the party. The couple got drunk and spent the night together. [The sponsor] was immediately regretful, remorseful and angry at herself for the momentary lapse in judgement. She was too embarrassed and ashamed to tell [the applicant] immediately after the events.
22. The following month, [the sponsor] discovered that she was pregnant. She was shocked and horrified. She knew that she could not keep the infidelity from [the applicant] and decided to tell him what had happened and about the pregnancy. [The sponsor] instructs that [the applicant] was very upset but said that he would support [her] throughout the pregnancy and accept the baby as his own child. He assured [her] that he loved her very much and would love her child like his own. ...
23. ... [The child] took on [the applicant's] family name as he is her father. [He] is listed on [the child's] birth certificate as her father. With the exception of [the sponsor's] two closest friends, everyone in their family and friendship circle believes [the child] to be [the applicant's] biological daughter. [The parties'] have decided not to tell [the child] about her biological father as she is too young to understand and they are concerned that it could impact her development and confuse her. Her biological father plays no role in her life.
24. The submission then argues that recording the applicant as the child's father does not render the birth certificate to be a bogus document as defined in s.5(1) of the Act. It notes there is no requirement to provide the biological father's name when applying for a birth certificate in Victoria. Indeed, the application process accounts for circumstances in which one parent is not biologically related to the child, e.g. where a child is conceived via a sperm donor.
25. The submission touches upon Departmental policy in relation to issues concerning Australian citizenship, noting that in this sphere, the recording of a person as a parent in a birth certificate is one of the factors to support a finding that the person is in fact a parent of that child (regardless of whether or not that the person is a biological parent of that child). The submission argues persuasively that migration law and policy should not differ or diverge from citizenship law and policy on the same issue.
26. The submission cites relevant caselaw concerning the factors which a decision-maker should have regard to when assessing the genuineness of a spousal relationship at the time of decision. The Tribunal agrees that absent evidence that the sponsor had returned to a spousal-type relationship with her ex-husband, her extra-marital sexual encounter with him does not, of itself, cast doubt on the genuineness of her spousal relationship with the applicant. In assessing the parties' relationship at the time of decision it is apparent that the sponsor's extra-marital sexual encounter with her ex-husband was indeed a lapse of judgement by her which does not reflect a lack of commitment by either party to a shared life together as husband and wife.
27. The evidence (including the written statements of the parties both dated 5 January 2023) shows that notwithstanding the sponsor's momentary lapse of judgement that led to the birth of the child, the parties are in a committed and long-term relationship, having been married since May 2018. [The child] has [the applicant's] family name and with the exception of [the sponsor's] two closest friends, everyone in the family and friendship circle believes [the child] to be [the applicant's] biological daughter. It is clear that he considers himself as her father and expresses a desire to love and support her through her life. He hopes for the parties to have their own children in time, who can be siblings to the child.
28. The submission argues that the inclusion of a parent who has no biological link to the child in a birth certificate is not false or misleading information nor a bogus document. In the circumstances of this matter and having regard to evidence as to the genuineness of the

spousal relationship between the parties, the Tribunal is persuaded by this argument and the submissions made in support of it.

29. The Tribunal finds there was no purposeful falsity or element of fraud or deception by some person for the provision to be engaged. The birth certificate records the applicant as the child's father because in the circumstances of the parties' relationship, and as recognised by all others, he fulfills that role.
30. The Tribunal therefore finds that the applicant has not given or caused to be given a "bogus document" as defined and therefore does not breach PIC 4020 for that reason.
31. That being the case, the information contained in the birth certificate is not "false" for the purposes of PIC 4020.¹ Therefore, the applicant meets PIC 4020(1).
32. The delegate has not raised any concern with the other limbs of PIC 4020 in this particular case.

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

33. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
34. The Tribunal finds that there is no evidence that aside from this application the applicant or any member of his family has been refused a visa in the relevant period because of a failure to satisfy PIC 4020 (1).
35. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

36. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The applicant has provided the Department with evidence of his identity by way of his Cambodian passport and this is not raised as a concern by the delegate.
37. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

38. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
39. There is no evidence before the Tribunal to suggest that the applicant or any family unit member have been refused a visa because of a failure to satisfy the relevant identity requirements in PIC 4020 (2A)
40. Therefore PIC 4020(2B) is met.
41. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.309.225.
42. Whilst the representative's submission addresses the 'relationship factors' in s.5F of the Act, the Tribunal sees no need to engage with these factors, other than tangentially, given its finding that PIC 4020 (1) is met.
43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

¹ *Trivedi and Others v Minister for Immigration and Border Protection and Another* (2014) 220 FCR at [32]

DECISION

44. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:
- Public Interest Criterion 4020 for the purposes of cl 309.225 of Schedule 2 to the Regulations

Stephen Conwell
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...